Filed 8/31/06 Yosemite Meat and Locker Service v. Carrasco CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

YOSEMITE MEAT AND LOCKER SERVICE, INC. et al., Plaintiffs and Appellants, v. PORFIRIO CARRASCO, Defendant and Respondent.	F047978 (Super. Ct. No. 339421) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Schofield & Associates, Louis F. Schofield and Lance K. Terpstra for Plaintiffs and Appellants.

Law Offices of Earl L. Bohachek and Earl L. Bohachek for Defendant and Respondent.

-ooOoo-

This case involves defendant's alleged breach of a settlement agreement in which he promised not to aid anyone in suing plaintiffs. Although the case is close on each point, we hold that: (1) the court erred in granting defendant's motion for summary judgment; (2) the court did not abuse its discretion in granting "without prejudice" defendant's motion for a protective order shielding defendant's lawyer from being

deposed or called as a witness, but must entertain a motion to lift the protective order on remand; and (3) did not abuse its discretion in denying leave to amend the complaint.

FACTUAL AND PROCEDURAL HISTORIES

Defendant Porfirio Carrasco (Carrasco or defendant) was an employee of plaintiff Yosemite Meat and Locker Service, Inc., a slaughterhouse company. In 1997, Carrasco and Yosemite settled a lawsuit Carrasco had brought against Yosemite, its president, plaintiff Johnnie F. Lau (plaintiffs), and Lau's wife, Gay L. Lau. The settlement agreement included the following provision:

> "Carrasco expressly agrees that he will not in any way encourage or willingly assist any person or entity in filing or pursuing any lawsuit, claim or administrative action against Yosemite, Johnnie F. Lau and Gay L. Lau in any federal or state court, or before state or federal administrative agency, except insofar as Carrasco may be required by statutorily authorized process to give testimony."

In June 2000, El Dorado Meat Company filed a complaint alleging unfair business practices against Yosemite and Johnnie Lau. Plaintiffs' complaint in the present case alleges that Carrasco breached the settlement agreement by encouraging and assisting El Dorado in pursuing that case, *El Dorado Meat Co. v. Yosemite Meat* (Super. Ct. Stanislaus County, No. 273086) (*El Dorado Meat*). The complaint also alleged that Carrasco encouraged and assisted Edward Sanchez in *Yosemite Meat v. Sanchez* (Super. Ct. Stanislaus County, No. 186765) (*Sanchez*), in pursuing a cross-action against Yosemite.

Depositions taken by the parties in this case revealed a meeting in Modesto in the spring of 2000 at which Earl Bohachek, then counsel for El Dorado, spoke with El Dorado representatives Todd and Burton Lee and with Edward Sanchez. Johnnie Lau testified at his deposition that he heard of this meeting when Todd Lee testified about it at trial in the *El Dorado Meat* case. Mr. Lau recalled that Todd Lee said Carrasco was present at the meeting. Carrasco acknowledged in his own deposition that the meeting took place, but denied that he participated in it. He said he walked by the meeting on the

way to his office. (The meeting took place in a Modesto building shared by Carrasco's business, Primo Meats, and Edward Sanchez's business, Chino Meats. "I walked to my office. That's different than attending a meeting," he said. "I passed through. I see some people. I don't recall who was in there, how many people were there, either. I just walked through there, and I see a few people standing there. I went on my business and out of there." At a deposition taken in Edward Sanchez's bankruptcy proceedings in 2002, Carrasco testified that he never attended any meeting at which Bohachek and Burton Lee were present. Todd Lee testified at his deposition in the present case that Carrasco "was on the premises, but … was not a meeting participant." More generally, Carrasco testified that he never did anything to encourage any lawsuit against Yosemite and the Laus, and that no one ever asked him to encourage or willingly assist in any such lawsuit.

After the meeting, on June 8, 2000, Bohachek filed the complaint in *El Dorado Meat* on behalf of El Dorado. No copy of that complaint is in the appellate record, but defendant's brief asserts (without contradiction by plaintiff's reply brief) that the complaint alleged unfair competition based on hiring of illegal immigrants and selling boar meat "secretly, to unsuspecting customers." Sanchez's case was already pending at the time of the meeting, but, according to Yosemite, Sanchez introduced a new issue ("boar sales") into that case via deposition questions in August 2000, a few months after the meeting.

When Yosemite brought the present case against Carrasco, Bohachek became Carrasco's attorney and is also his attorney on appeal. Because Bohachek was at the meeting in which Carrasco allegedly helped Bohachek's client, El Dorado, Yosemite served Bohachek with a deposition subpoena.

Bohachek responded to the subpoena by filing a motion for a protective order shielding him from being deposed or being called to testify at trial. In a declaration supporting the motion, Bohachek did not deny that the meeting took place or that he

attended it. Instead, he asserted that Yosemite "intends to depose each and every individual who has the same information as I do with regard to what happened at a single meeting that I attended," and that his deposition therefore would be unnecessary. In a brief, Bohachek referred to Carrasco, Todd Lee, and Burton Lee as "the three (3) witnesses to that meeting …." Yosemite had noticed the depositions of each of those witnesses. (Bohachek did not mention three other people present at his meeting—Jorge Martinez, Kathy Martinez, and Wesley Jones—who will be discussed later.)

The trial court granted the motion and issued the protective order. The sole ground for the order stated by the trial court was that "plaintiffs have not met their burden of demonstrating that there are no other means available for obtaining the information sought from Mr. Bohachek." At the hearing, plaintiffs' counsel asked the court if the ruling was "without prejudice," and the court said it was.

Todd Lee, Burton Lee, and Carrasco himself said nothing in their depositions to undermine Carrasco's description of what he did at the meeting. Yosemite, however, subsequently located two additional meeting participants, Jorge and Kathy Martinez, and obtained their declarations. Both stated that "[t]he topic of the discussion at the meeting was making a case against Johnnie Lau and Yosemite Meat," that the meeting lasted "between 35 minutes and one hour," and that Carrasco attended. Jorge Martinez's declaration directly contradicted Carrasco's claim that he only passed through: "Carrasco was present for the entire length of the meeting, participating in the discussion and talking about Yosemite Meat and their use of certain pigs."

While the motion for a protective order was pending, Yosemite filed a motion for leave to amend its complaint. Yosemite claimed that it learned during depositions that attorney Philip DeMassa, who represented Carrasco in his original suit against Yosemite, had given business records and financial data to Richard Nordstrom, an expert witness retained by DeMassa in *Sanchez*. Nordstrom was allegedly planning to use the records and data against Yosemite in that case. Yosemite asserted that the records and data had

been provided to Carrasco and DeMassa in the original Carrasco litigation, and that Carrasco and DeMassa were both required by the settlement agreement to collect the records and return them to Yosemite. Both Carrasco and DeMassa breached the settlement agreement by allowing Nordstrom to retain the information, Yosemite contended, so it should be allowed to amend its complaint to add these allegations and name DeMassa as a defendant. The trial court denied the motion for leave to amend.

In his motion for summary judgment, Carrasco undertook to show that there were no triable issues regarding plaintiffs' three claims: that Carrasco helped El Dorado by participating in meetings; that he helped Sanchez by participating in meetings; and that he failed to get Yosemite's business records back from DeMassa, who then allowed Nordstrom to use them against Yosemite. On the first issue, Carrasco relied primarily on his and Todd Lee's deposition testimony that he was momentarily present at the spring 2000 meeting in Modesto but did not participate in the discussion. He also relied on Johnnie Lau's deposition testimony that he did not know what Carrasco actually said at the meeting. On the second issue, Carrasco relied primarily on his own and Sanchez's deposition testimony denying that he was present at other alleged meetings and Lau's testimony that he did not know what Carrasco might have said at those meetings. On the third issue, Carrasco argued that plaintiffs could not assert any claim about Nordstrom's possession of records and data because the motion for leave to amend the complaint had been denied. On the merits of the claim, he relied on his own declaration and deposition testimony stating that he destroyed all financial information relating to Yosemite in his possession at the conclusion of his original case against Yosemite, and that he had nothing to do with Nordstrom's possession of that information. He also relied on Nordstrom's deposition testimony that he obtained the data in question independently from Yosemite via discovery in the *Sanchez* case.

In opposing the motion with respect to the first issue (help to El Dorado via the spring 2000 meeting in Modesto), plaintiffs relied primarily on the declarations of Jorge

and Kathy Martinez. On the second issue (help to Sanchez), plaintiffs emphasized that Sanchez was present at the spring 2000 meeting in Modesto, not just the other alleged meetings. They argued that even if evidence of the other meetings was lacking, the Martinez declarations raised a triable issue of whether Carrasco encouraged or assisted Sanchez at that meeting. On the third issue (Nordstrom's possession of Yosemite's records and data), plaintiffs argued that even without amending the complaint, it was entitled to advance Nordstrom's possession of the data as a claim against Carrasco, who should have caused the data to be returned or destroyed. On the merits of that issue, plaintiffs relied on their counsel's declaration that Nordstrom had and used not only the data produced in discovery in the *Sanchez* case but other data as well, which could only have come from the original Carrasco litigation. Plaintiffs also relied on an order of the court finding that DeMassa had failed to comply with a protective order issued in the original Carrasco litigation, under which he was required to return or destroy Yosemite's data.

The trial court granted the motion for summary judgment. In its order, it stated that "[p]laintiffs have offered no admissible evidence that there has been any duty breached by defendant pursuant to the Settlement Agreement between the parties," and that "[e]ach of the objections by defendant to the evidence proffered by plaintiffs in their Opposition to the Motion is sustained, and plaintiffs' objections are each overruled." The order did not comment on or analyze any of plaintiffs' specific claims, and the only specific evidence it addressed was the Martinez declarations and a declaration by plaintiffs' counsel, Louis Schofield. Regarding those declarations, the court stated:

> "Specifically, the objections by defendant to evidence proffered by plaintiffs in the Declarations of Jorge Martinez, Kathy Martinez and Louis Schofield, respectively, are sustained, in their entirety, for the reasons set forth by defendant. Specifically, the proffered evidence in the Jorge Martinez and Kathy Martinez Declarations, objected to by defendant, lacks foundation and, further, does not recite facts but, rather, recites conclusions and opinions only. Further, with regard to the Jorge Martinez Declaration, the objections by defendant are sustained with regard to attempts to recite

> inadmissible hearsay, in addition. The Schofield Declaration recites irrelevant information, and the objections by defendant are sustained, in their entirety."

The court concluded by stating that these evidentiary rulings were the basis of the decision: "The proffered evidence by plaintiffs fails to create a triable issue of fact *because the objections to admissibility are each upheld*." (Italics added.) The court's decision included an order granting Carrasco's motion to strike the declarations of Schofield and Jorge and Kathy Martinez.

After judgment was entered, Yosemite filed a motion for a new trial based on claimed new evidence. The motion was based on a declaration by Wesley Jones, a former employee of Yosemite who attended the Modesto meeting in the spring of 2000. He declared that the purpose of the meeting was "to discuss what I knew about the business operations of Yosemite Meat Company," and that Carrasco was present "throughout" the meeting. According to Jones, Carrasco "participated in the discussions about Yosemite Company's operations" and "acted as a mediator in helping Mr. Bohachek frame his questions." Carrasco's role included "helping to explain who the people were and about what job duties [Jones] had, and what job duties Jorge and Kathy Martinez had at the plant." After Bohachek "would ask a question about a particular operation," "Ralph [i.e., defendant Carrasco] and Eddie [Sanchez] would talk to one of us [i.e., Jones and the Martinezes] to ask about what knowledge we had." The subjects of the questions included "the slaughter of boars, the number of animals slaughter[ed] per day and [what] the number of boars was in relation to other pigs." Schofield, Yosemite's counsel, submitted a declaration stating that he had asked Jones to sign a declaration earlier and that Jones had refused, changing his mind only after the summary judgment motion was granted.

The court denied the motion. In its order, it found that "plaintiffs' moving evidence itself shows that plaintiffs were not diligent in bringing the purported new

matter to the Court's attention prior to its ruling granting defendant's Motion for Summary Judgment."

The court also granted Carrasco's motion for attorney fees, which was based on a clause of the settlement agreement providing for attorney fees for the prevailing party in any dispute over enforcement of the agreement. Carrasco was awarded $79,924 for Bohachek's fees.

DISCUSSION

I. Summary judgment

Plaintiffs argue that the trial court erred in granting the motion for summary judgment. We agree. The court's decision was based on its decision to sustain Carrasco's evidentiary objections to the Martinez declarations and a declaration of Louis Schofield, and to strike those declarations. We need only consider the Martinez declarations, the objections to which had no merit and which the court was bound to consider. Those declarations raise a triable question of whether Carrasco encouraged or willingly assisted Bohachek, El Dorado, or Sanchez in suing Yosemite by participating in the Modesto meeting in the spring of 2000.

We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) The trial court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," and may not do so otherwise. (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) Further, "our account of the facts is presented in the light most favorable to the nonmoving party below, in this case

plaintiff, and assumes that, for purposes of our analysis, her version of all disputed facts is the correct one." (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 159.)

We begin with the trial court's evidentiary rulings. The court ruled that there was no admissible evidence indicating that Carrasco encouraged or willingly assisted Yosemite's litigation adversaries. That ruling was based solely on the exclusion of the two Martinez declarations and the Schofield declaration. There is a split of authority regarding the standard of review applicable to a trial court's evidentiary rulings in connection with a summary judgment motion. Some Court of Appeal panels have held that these rulings are reviewed de novo (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 12-13), while others have held that they are reviewed for abuse of discretion (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694). As we will explain, the court's evidentiary rulings as to the Martinez declarations must be reversed under either standard, for the objections sustained were without merit.

In excluding the Martinez declarations, the court stated that these lacked foundation, stated conclusions or opinions instead of facts, and, in the case of Jorge Martinez's declaration, recited inadmissible hearsay. The lack-of-foundation objection, as stated in Carrasco's motion to strike and his reply brief on the summary judgment motion, was that "neither Declaration states that either declarant was present for the entire meeting or that either declarant was in a position to hear what went on, or what was said, at that 'entire meeting' …." This was not a basis for a lack-of-foundation objection under these circumstances. The declarations stated that Jorge and Kathy Martinez attended the meeting, that it lasted 35 minutes to an hour, and that they had personal knowledge of those facts. This was a sufficient foundation for the declarants' assertions about who was at the meeting and what was said. Carrasco's objection implies that the declarants were required to say "we were present for the entire meeting and were positioned in such a manner as to be able to see the participants we have named and to

hear the discussion we have described." That would be an unnecessary requirement, particularly at the summary judgment stage, when the "affidavits … of the opposing party are liberally construed." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178-179.)

Yosemite's motion to strike argued that the Martinez declarations expressed conclusions and opinions, not facts, because they contained these statements: "The topic of the discussion at the meeting was making a case against Johnnie Lau and Yosemite Meat"; "I specifically recall being asked about and discussing their use of boars and their purchasing of boars from Canada"; and, "I specifically remember discussion having to do with certain pigs used by Yosemite Meat and also the size of those pigs." There is no reason to construe these statements as meaning anything but that the declarants heard meeting participants talking about making a case against Yosemite and Lau and remembered being asked about and talking about pigs and boars. That they heard and discussed these matters is an asserted fact, not a conclusion or opinion.

Yosemite's hearsay objection in the motion to strike was to Jorge Martinez's statement that Carrasco talked about Yosemite and pigs. This cannot possibly be hearsay, as it was not offered for the truth of the matter asserted. (Evid. Code, § 1200.) The declaration did not even state the matter asserted: It did not say what Carrasco said about Yosemite or pigs. It only said that Carrasco discussed those subjects. The declaration was offered as evidence that he discussed them, not for the truth of what he said about them.

In sum, Jorge and Kathy Martinez testified in their declarations that they were percipient witnesses to several ordinary facts: they were present at a meeting; they saw specified people there; and they heard those people discuss specified subjects. The objections were groundless. The trial court abused its discretion in sustaining them and striking the declarations.

The Martinez declarations raise triable issues. They do so in three ways. First, they contradict Carrasco's testimony that he only passed through the meeting. Since we must assume that the nonmoving party's version of disputed facts is correct, we must assume that Carrasco testified falsely on this point.

Second, if Carrasco testified falsely about his participation in the meeting, a reasonable jury could also infer that he testified falsely about the ultimate issue when he said he did not encourage or willingly assist Yosemite's litigation adversaries. Standard jury instructions, both civil and criminal, reflect the well-established principle that a finder of fact can reject a witness's whole testimony if the witness willfully testifies falsely on one material point. (BAJI No. 2.22; CALJIC No. 2.21.2; see also *Nelson v. Black* (1954) 43 Cal.2d 612, 613; *People v. Reyes* (1987) 195 Cal.App.3d 957, 966.)

Third, and separate from the issue of Carrasco's credibility,[1] the Martinezes' description of the meeting could give rise to a reasonable inference that it was a litigation planning meeting and that Carrasco was there to help. We acknowledge the weaknesses of the declarations. They were vague and did not report any particular statements Carrasco made that would have amounted to encouragement or willing assistance. But in reviewing a summary judgment we must construe the nonmoving party's evidence liberally. (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at pp. 178-179.) In light of that standard, evidence that Carrasco attended a meeting with Yosemite's litigation adversaries and their attorney and discussed aspects of Yosemite's business is enough to raise a triable question of whether Carrasco encouraged or willingly assisted those adversaries in advancing claims against Yosemite.

---

[1]The conclusion that Carrasco was not truthful when he said he gave no aid or encouragement would not be enough, by itself, to establish that he did give it. Other evidence would be necessary. "If a witness testifies, for instance, that *it was not raining* at the time of the collision, and if the jury disbelieves that testimony, such belief does not provide evidence that it *was raining* at the time of the collision." (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 48.) The Martinez declarations provided the other evidence.

Having reached this conclusion, we need not address the evidence on the other factual issues raised in the parties' briefs: additional meetings Carrasco allegedly attended and Carrasco's alleged failure to satisfy a duty to recover and destroy or return data that ended up in the hands of Nordstrom. Carrasco's motion did not include an alternative request for summary adjudication of issues, and triable issues supporting just one of Yosemite's theories of liability are sufficient to reverse the summary judgment. Reversal of the summary judgment also, of course, necessitates reversal of the order awarding attorney fees to defendant.

II. New trial motion

Yosemite argues that its new trial motion was denied erroneously, but reversal of the summary judgment renders that issue moot. We need not address it.

III. Protective order

Yosemite contends that the trial court abused its discretion in granting defendant's motion for a protective order barring Bohachek from being deposed or called as a witness at trial. We disagree, but only because the trial court stated that it was granting the motion "without prejudice," giving plaintiffs an opportunity they never took to raise the issue again if the need for Bohachek's testimony became clear. We direct the trial court to entertain a motion by plaintiffs, should one be made, to vacate the order on remand. When it does so, it will need to take account of the development of the evidence after the order issued.

The standard usually applied to the question of when counsel in a case can be compelled to testify in the case is set forth in *Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1496 (*Spectra-Physics*):

> "The circumstances under which opposing counsel may be deposed are limited to those where (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and not privileged; (3) the information is crucial to the preparation of the case."

These criteria reflect a view that "the practice of taking the deposition of opposing counsel should be severely restricted, and permitted only upon showing of extremely good cause …." (*Fireman's Fund Ins. Co. v. Superior Court* (1977) 72 Cal.App.3d 786, 790.) There is no California Supreme Court authority on this subject, and some other jurisdictions adopt a less hostile attitude toward deposing counsel. (See, e.g., *In re Subpoena Issued to Dennis Friedman* (2d Cir. 2003) 350 F.3d 65, 72 [fact that proposed deponent is a lawyer does not automatically require the deposing party to prove the same information cannot be obtained by other means; availability from other sources is only a factor to be considered]; *Munn v. Bristol Bay Housing Auth.* (Alaska 1989) 777 P.2d 188, 196 [rejecting *Spectra-Physics*; "an attorney is no more entitled to withhold information than any other potential witness"].) Nevertheless, we will assume that *Spectra-Physics* states the applicable test.

We review for abuse of discretion a protective order issued to limit intrusive or oppressive discovery. (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1286-1287.) In applying this standard of review, however, we bear in mind the policy in favor of liberal allowance of discovery: "Absent a showing that substantial interests will be impaired by allowing discovery, liberal policies of discovery rules will generally counsel against overturning a trial court's decision *granting* discovery [citation] and militate in favor of overturning a decision to *deny* discovery." (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 987.)

Only one of the *Spectra-Physics* factors, the availability of the same information from sources other than the attorney, was ever in dispute. Defendant never argued that information about what happened at the meeting was privileged. The meeting took place before Carrasco was Bohachek's client; and although clients of Bohachek were present, third parties (including Carrasco) were as well, so the meeting was not confidential. There is no doubt that information about what happened at the meeting is relevant to the issues in the case. Therefore, the second element of the *Spectra-Physics* test (the

information is relevant and not privileged) is undisputedly satisfied. Defendant also never argued that the facts about what happened at the meeting were not crucial to the preparation of plaintiffs' case, and there is no doubt that they are. The third factor is therefore also satisfied. The only argument defendant made in support of blocking his deposition, and the only argument he makes on appeal, was based on the first factor, whether there were other means of getting the information. The trial court based its decision on that factor alone. The only reason for granting the motion stated in the court's order was that "plaintiffs have not met their burden of demonstrating that there are no other means available for obtaining the information sought from Mr. Bohachek." In fact, the court expressly found at the hearing that information about what happened at the meeting was relevant, unprivileged, and crucial to the case.

The court issued the order in spite of plaintiffs' argument that no depositions had yet taken place, so it was impossible to know whether Bohachek's testimony would be merely cumulative evidence. The other meeting participants might give conflicting evidence about events at the meeting, and then Bohachek's testimony might be necessary to help resolve the conflict. Plaintiffs contended that the motion was premature for this reason. Evidence collected by plaintiffs after the protective order was issued—the declarations of the Martinezes and Jones—bore out this contention. Neither plaintiffs nor the trial court could know at the time the motion was decided whether Bohachek's testimony would be cumulative to the testimony of other meeting participants.

The trial court evidently recognized this problem. We can see no other reason for its statement at the hearing that its decision to issue the protective order was "without prejudice." We can see no other point in stating this but to allow plaintiffs to move to vacate the protective order if subsequent discovery showed Bohachek's testimony would not merely be cumulative to other witnesses's evidence.

Because the ruling was provisional, we cannot say the court abused its discretion. It could not yet be shown, one way or the other, whether the second prong of the *Spectra-*

Physics test was satisfied. Testimony, not yet taken, of other witnesses to the meeting would show this factor. The court's decision to shield Bohachek from being deposed until this happened, while allowing plaintiffs to raise the issue again later, was a perfectly reasonable solution to this problem.

We do not know why plaintiffs never made a motion to vacate the protective order before the summary judgment motion was decided, and the parties say nothing about that in their briefs. But it is now apparent that Bohachek's testimony about the meeting and Carrasco's role in it, if any, will not only not be cumulative, but could be of unique significance. Other witnesses have now flatly contradicted each other about Carrasco's role, if any, at the meeting. An attorney's memory of his own litigation planning meeting is apt to be clearer and more detailed than that of laypeople at the meeting. Bohachek's testimony could well resolve the conflict in the evidence and may be the only way to do so. Bohachek's testimony therefore may be the only means of obtaining needed evidence, satisfying the second element of the *Spectra-Physics* test.

Another consideration also supports our decision to direct the trial court to entertain any motion plaintiffs may bring on remand to vacate the protective order. The *Spectra-Physics* approach is based on the idea that deposing opposing counsel is disruptive to the litigation process because it intrudes on the attorney-client relationship and enables one attorney to pry into the other's plans and strategies, among other reasons. The *Spectra-Physics* court quoted a U.S. Supreme Court case stating that "'("[d]iscovery was hardly intended to enable a learned profession to perform its functions … on wits borrowed from the adversary.").'" (*Spectra-Physics, supra*, 198 Cal.App.3d at p. 1494.) This objection cannot be made where, before the attorney became the party's counsel, the attorney was a percipient witness to the events from which the alleged liability arose, and the attorney's testimony is sought on those events only. That is the situation here. We are not dealing with a case in which an adversary is seeking to learn of events that

happened during an attorney's representation of a party or during the course of the litigation.

The case more closely resembles one in which an attorney witnesses an auto accident and then undertakes to represent one of the drivers. Here it is undisputed that the Modesto meeting in spring 2000 took place, that Bohachek and his client were there, and that Carrasco was physically present at least momentarily. When Carrasco was sued for allegedly helping Bohachek's client, Bohachek should have known that this meeting would be a subject of discovery and that his testimony would be sought. Now that this has happened and the testimony of other meeting participants is in conflict, Bohachek will not be in a position to complain of his predicament if the protective order is lifted.

Carrasco's motion included a request that the order protect Bohachek from being called as a witness at trial as well as from being deposed. The court's order granted that request. Neither defendant nor the court gave any separate reasons for this request. The court shall also reconsider this question if asked to do so by plaintiffs on remand.

We are aware that Bohachek's predicament includes the possibility that, unless he obtains his client's consent, he will be disqualified from continuing to represent Carrasco if compelled to testify before a jury. (Rules Prof. Conduct, rule 5-210.) The parties may be able to avoid the problem, however. Witkin states:

> "An embarrassing and prejudicial situation can arise where a party calls the other party's attorney to give testimony unfavorable to the attorney's client. This may and should be avoided by a stipulation on the matter involved, preferably made outside the presence of the jury. But where the stipulation is sought and rejected without justification, there is no misconduct in forcing an admission on the stand." (2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 55, p. 304.)

We hold that the trial court did not abuse its discretion when it granted defendant's motion for a protective order without prejudice. At that stage of the litigation it was impossible to know (and impossible for plaintiffs to prove) that Bohachek's testimony would be noncumulative. But because subsequent discovery showed that it would be, the

court must give plaintiffs an opportunity on remand to move to vacate the protective order.

IV. Leave to amend

Yosemite contends that the trial court abused its discretion by denying its motion for leave to amend the complaint to add DeMassa as a defendant and to claim that he and Carrasco breached the settlement agreement by failing to return or destroy Yosemite's records and data and instead providing them to Nordstrom, who used them against Yosemite in other litigation. We disagree.

A motion for leave to amend a complaint is directed to the trial court's discretion. (Code Civ. Proc., § 473, subd. (a)(1).) The court is to exercise its discretion under a general rule of liberal allowance of amendments. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939.) "[I]t is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' [Citations.] If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Even if there has been delay in the filing of the request for leave to amend, it is an abuse of discretion to deny leave if the other party has not been prejudiced or misled. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.) On appeal, the conflict between the deferential abuse-of-discretion standard of review and the policy of allowing amendment liberally "'is often resolved in favor of the privilege of amending, and reversals are common where the appellant makes a reasonable showing of prejudice from the ruling.' [Citation.]" (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-297.)

Plaintiffs' proposed amendment added several new paragraphs to the complaint. Paragraphs 9 and 10 added factual detail to the original complaint's claim that Carrasco

helped the plaintiffs in the *El Dorado* and *Sanchez* cases, asserting that he attended meetings and provided information. Paragraphs 11, 12, and 13 alleged that DeMassa violated the settlement agreement by failing to return or destroy data Yosemite provided in the original Carrasco litigation and allowing Nordstrom to use that data in other litigation.

Despite the policy of allowing amendment liberally, we cannot say the court abused its discretion in this case. The trial court based its decision on plaintiffs' unexcused delay in seeking to amend and prejudice to defendant arising from the need for further discovery, among other reasons. "There is a platoon of authority to the effect that a long unexcused delay is sufficient to uphold a trial judge's decision to deny the opportunity to amend pleadings, particularly where the new amendment would interject a new issue which requires further discovery." (*Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 692.) Both a long, unexcused delay and a need for further discovery were present here.

The long, unexcused delay was a period of at least 10 months from the time plaintiffs first learned of Nordstrom's possession of the data and suspected DeMassa of supplying it to him to the time they sought leave to amend the complaint. In their motion, plaintiffs claimed that they first learned of the basis of its allegations regarding DeMassa, Nordstrom, and the data during DeMassa's deposition on August 4, 2004. Carrasco responded by showing that Yosemite had made similar allegations much earlier in other litigation. On October 1, 2003, Yosemite's counsel Louis Schofield (who is plaintiffs' counsel in the present case also) wrote a letter to the discovery referee in the *El Dorado* case. The letter asserted that DeMassa, Nordstrom, and another expert were violating a protective order and the settlement agreement in the original Carrasco litigation by using financial data obtained in discovery from Yosemite during that litigation. An October 3, 2003, letter from Schofield to Bohachek, who was then

representing El Dorado, also referred to this dispute. On November 5, 2003, Schofield executed a declaration reciting the same facts.

In their reply brief in support of the motion for leave to amend, plaintiffs argued that there was no delay in filing the motion because the issue in the earlier proceedings was "Dr. Nordstrom's possession of the data, and the belief that there was a failure to seek the return and/or destruction of the information by Mr. Carrasco and Mr. DeMassa …." The issue in the present case, they contended, was "not the failure to seek the return/destruction of the information but rather the affirmative delivery of the protected materials from Mr. DeMassa to Dr. Nordstrom." The proposed amended complaint, however, alleged both that DeMassa "delivered" records and documents and that he failed "to return or destroy" them. Plaintiffs never explained why they had to wait to amend the complaint until they had evidence to support both of these allegations instead of just one of them.

In any event, plaintiffs do not repeat in their appellate briefs the argument that they first learned the pertinent facts in August 2004 and did not know them in October 2003. We infer that the argument has been abandoned and that plaintiffs no longer contend that they could not have amended their complaint in October 2003. The long, unexcused delay is established.

A need for further discovery is likely. All the witnesses whose depositions are documented in the appellate record were deposed in June, July, and August of 2004, long after plaintiffs could have sought to amend the complaint but before they did so. Carrasco contends that this means he will have to re-depose all the witnesses if the amendment is allowed. Plaintiffs argued in opposing the motion that they anticipated nothing beyond serving additional paper discovery on DeMassa, but now say only that the cost of bringing separate litigation would exceed the cost of any additional discovery. On the basis of the appellate record, we are not able to make an accurate prediction of the amount of additional discovery that the amendment would necessitate. Under the

circumstances, however, we cannot say that the trial court abused its discretion when it concluded that the need for additional discovery would be prejudicial.

In addition to prejudicial delay, the trial court also ruled that California Rules of Court, rules 327 and 375, supported denial of leave to amend. In light of our holding that the prejudicial delay sufficed to support the ruling, we need not address these additional bases.

In their briefs, the parties discuss the issue of whether, if amendment is not permitted, evidence regarding DeMassa, Nordstrom, and the data can still be used to prove Carrasco breached the settlement agreement by allowing the data to be disseminated or failing to return or destroy it. The trial court never ruled on the question of whether evidence of this should be excluded on the theory that it was not covered by the original complaint. That question must be decided by the trial court in the first instance. We will not address it.

DISPOSITION

The judgment is reversed and the case remanded to the trial court with directions to vacate the orders granting the summary judgment motion and awarding attorney fees and to enter a new order denying the summary judgment motion. The trial court is also directed on remand to entertain any motion plaintiffs may make to vacate the protective order shielding Bohachek from being deposed or called as a witness at trial. The order denying plaintiffs' motion for leave to amend the complaint is affirmed. Plaintiffs shall recover their costs on appeal.

_____
Wiseman, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Hill, J.